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## Local court reforms and 'global' law

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### Abstract

Discussions of globalisation arose in the late twentieth century out of economic discourse about market liberalisation and the scale and global reach of transnational corporations. Legal discussions of the subject have tended to follow in the wake of these economic and geopolitical trends.

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## Local court reforms and ‘global’ law

**Richard Mohr\***

### 1. Introduction

Discussions of globalisation arose in the late twentieth century out of economic discourse about market liberalisation and the scale and global reach of transnational corporations. Legal discussions of the subject have tended to follow in the wake of these economic and geopolitical trends. This economic point of view foregrounds trade law, international transfers of finance and ownership, and the role of national and international financial institutions. Much of the debate, particularly in the high era of the ‘Washington consensus’, concentrated on questions of hegemony and nationalism, identifying the competing or complementary interests of corporations, national governments and international institutions.

The present research takes both a longer-term historical view and a broader approach to the local or national and global or universal tendencies in recent reform programmes. It proceeds through two case studies encompassing international allegiances, reference points and meaning systems that go beyond the fiscal framework, to include local and cultural discourses about values, entitlements and the place of law. To this end, the inquiry draws on established traditions of legal and jurisprudential discourse predating ‘globalisation’ studies.

The immediate focus of the case studies is on law and court reform programmes in Indonesia and Venezuela in the 1990s. Each of these programmes was supported by Washington-based international financial institutions (IFIs), working with local legal and governmental elites with varying degrees of cooperation or coercion. Each was accompanied by turbulent local events. While there were financial dimensions to those events, and to the motivation of the IFIs promoting the reforms, this study attempts to place them in a broader social context by reference to historical and sociological data.

In each case, the reforms of the time were subsequently overtaken by local political circumstances and crises. Those circumstances can be frustrating to the legal sociologist or comparative lawyer who wishes that the subject would stay still long enough to get a snap-shot of it. However, with the benefit of a somewhat longer view, it becomes possible to identify some

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of the confused and incessant interactions between the local and the international, the legal and the political, which are after all the real subject-matter.

Indonesia and Venezuela are both particularly interesting as sites for comparative research into the interaction of legal systems in reform programmes, albeit for different reasons. They have in common the economic status of developing nations, former colonies (of Spain and the Netherlands respectively) and clients of IFIs. They have both had stormy recent political histories, widespread mistrust of the judiciary and ambivalent orientations to the rule of law. Within the parameters of these historical situations, both Indonesia and Venezuela offer valuable terrain for legal sociology, dating back to their very different histories, before, during and after their colonial periods. I will elucidate these points when I return to the national case studies.

## **2. Theoretical background: Law in a global context**

The established traditions of legal theory to which I referred above derive from competing orientations to the sites of law. The debate on globalisation or global law revolves around the question of whether law derives from international, national or local sources. Legal pluralism and its challengers suggest terms in which we may better understand the interactions of these levels. This refocuses the debate on the interactions between law from different sources, rather than asking whether global or universal legal precepts have been successfully translated into national enactments of law. While ‘pluralism’ only arises as a self-conscious movement in the twentieth century, legal history is rich in conflicts between local or traditional legal forms and the influences of a colonial power or supranational ideologies and practices.

In globalisation debates national law is identified as localised law, which is set against international principles and practices. The latter are often identified with principles of free trade, accompanied by the ideology of neo-liberalism. In this scenario, the global takes on the form of a *lex mercatoria*, enabling international trade, but with little relevance to the lives and social conditions of the people living under national laws, except to the extent that they enter into market relationships having international repercussions. Seen in this light, supranational interests may be associated with trade and capital, ranged against local interests. The latter may be represented as national sovereignty or the economic interests of local communities, and frequently the one is confounded with the other. We see the manifestations of such polarised debates in those ritual encounters between riot police and demonstrators that we can look forward to each time there is a meeting of the G7 or some other international economic and political forum. Such polarised encounters are usually more entertaining than illuminating, whether they take place in the streets of Seattle or Davos or the convention rooms of socio-legal conferences.

The recently named phenomenon of ‘globalisation’ may be seen in the context of a long socio-legal history of trends towards systematisation, unification and internationalisation. Traditionally, empires and world religions have been the vectors promoting universalising trends. Roman law and Islam are two obvious movements that reappear in the present account in various guises. Unification and systematisation found a new locus in the nation state, which tended gradually to eclipse the influence of empires and world religions. Throughout the period of its ascent, from the eighteenth to the twentieth centuries, the nation state grew to dominate and rationalise legal systems into a uniform law of the land. Gradually systematising and then replacing a diversity of local tribal, feudal and guild laws, the nation came to have a near monopoly on legislation and the application of law across a patchwork of territorial jurisdictions

in Europe and, as they gained independence, the countries of the new world.<sup>1</sup> Beyond the bounds of Europe and the independent sovereign nations, however, more traditional imperial relationships coexisted with the sovereignty of the metropolitan and independent powers. Uniform national law has been both a political and an intellectual project which has invented, justified and enforced legal uniformity.

Despite the dominance of nations, there have continued to be pressures for both supranational and local legal regimes. These conflicts have been worked out at theoretical and, as will be seen in the case of Indonesia, practical levels. The localising traditions emphasise that groups within national legal boundaries may have their own legal precepts and practices distinct from those of the formal national regime. Identifying themselves as 'legal pluralists' in the late twentieth century,<sup>2</sup> we may recognise a longer tradition, reaching back to Montesquieu and revived in the early twentieth century by Santi Romano and, later, Gurvitch.<sup>3</sup> Studies of colonisation and of counter-hegemonic practices provided rich historical and theoretical evidence of coexistence and conflict among a plurality of legal systems. These studies indicate that legal regimes exist at local levels below that of the nation state.

Similar methods and approaches may be applied to understand the relationship between local and national regimes and international sites of law. Projects seeking to unify laws at a scale higher than that of the nation state predate nationalism, and are engaging again in new as well as some familiar sites. As an abstract set of principles and the foundation of a legal order, law seeks a universal justification of decisions and enforcement. Established principles of Roman law or of common law continue to inform the legal decisions of the civil and common law worlds as they have done since the eleventh century in Europe.<sup>4</sup>

The revival of interest in supranational legal forms is a response to various formal declarations and a developing institutional framework which reach across the nation state to regulate an expanded range of relationships between citizens, refugees, nations and corporations. The legal framework which has grown up in the European Community is a particularly advanced supranational structure, comprising the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), numerous trade-related protocols and decrees, the European Court of Justice and a legislature. This structure is so formal and well developed that it may almost be seen as an international formation on the way to a federation. There are numerous other examples of international conventions and legal structures which are far weaker and which apply to most of the nations around the world. These range from declarations on human rights and the establishment of the International Criminal Court to trade treaties and mechanisms for resolving disputes arising in international commerce (e.g. the World Trade Organisation). International courts and other international legal institutions have important roles in the convergence of laws among nations.<sup>5</sup>

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1 H.J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 1983, Part 2, *passim*; M. Weber, *Economy and Society. An Outline of Interpretive Sociology*, 1978, p. 698.

2 The intellectual counter-tendency of legal pluralism was seen as having been a 'combative infant' in the early 1980s, eliding the very substantial history of these ideas both in the twentieth century and before (J. Griffiths, 'What is Legal Pluralism?', 1986 *Journal of Legal Pluralism* 24, p. 1).

3 R.A. Macdonald, 'Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism', 1998 *Arizona Journal of International and Comparative Law* 15, p. 76; S. Romano, *L'ordre juridique*, 1975.

4 International law, as a mechanism for regulating the relationships between nations, has existed for longer than the domestic legal systems of most of the nations it regulates today. My focus here is less on the law between nations than on the laws as they apply within and above nations.

5 M. Shapiro, 'The European Court of Justice', in P.H. Russell *et al.* (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, 2001. Hardt and Negri propose international courts as an imperial device, but then question whether the new biopolitical imperial power can be represented by a juridical order at all. M. Hardt *et al.*, *Empire*, 2000.

It has been said that global law (so-called to distinguish it from a traditional 'international law' of nations) has two distinct 'sites' dealing with human rights and the global economy respectively.<sup>6</sup> These different institutional sites have been theorised in different ways, often proposing differing political contexts or outcomes between trade law and human rights law. The global trade regime has its roots in the idea of a *lex mercatoria* applying between merchants, based in the need for a universal recognition and enforcement of contracts, revived from the historical period when law was systematised to work across splintered legal regimes.<sup>7</sup> Both the modern *lex mercatoria* and human rights law have been criticised for their Western bias and their imperialist overtones. The critiques of world trade agreements are well known through various anti-globalisation polemics and campaigns against unfair practices which are promoted or allowed by these agreements. The critique of human rights discourse is more nuanced and equivocal. Fitzpatrick has summed up his own analysis as follows:

'[T]he problem with human rights is not that they are universal or that they have a particular practical purchase, or even that they contain both these qualities. The problem lies in these two things being made to correspond to each other. 'Universal' human rights correspond to some particular practice somewhere. The obvious contradiction is resolved by making the location of that practice exemplary. The practice can then correspond to the universal ideal. And that practice, trailing clouds of its universal glory, is definitively situated in the West, a 'West' which is the occidental orientation of the community of nations.'<sup>8</sup>

Fitzpatrick goes on to point out that, under the 'new legal imperialism', human rights law is embedded into the contractual arrangements of the International Monetary Fund (IMF) and the World Bank. It is thus a negotiated imperialism, entered into by autonomous and formally equal but abject nations. While recognising the different conditions attaching to various loans and agreements between international financial institutions and client nations, Fitzpatrick claims that their broad thrust is similar. In particular, they consistently promote a legal regime which mimics that of the Western nations that provide the loans and control the finance agencies. In these ways the 'imperialist' or 'convergent' laws of international trade mesh with the other 'site' of human rights law.

In his consideration of reform programmes sponsored by the IFIs in transitional regimes and developing nations of America, Asia and Europe, Santos concludes that they have the effect of concentrating democracy in an inner circle to the exclusion of a broader national group of citizens. Through a process of 'political contraction' which emphasises the political relations of central elites in the client countries, the programmes which Santos studied restricted representation and participation with consequences in political violence and corruption. 'Rather than being a countervailing force, the rule of law and the judicial system may reproduce such contraction by reinforcing the distinction between enfranchised and disenfranchised citizens'.<sup>9</sup>

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6 The 'two sites' conception has been proposed by Sassen and elaborated in P. Fitzpatrick, *Modernism and the Grounds of Law*, 2001, pp. 203 *et seq.*

7 G. Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems', 1997 *American Journal of Comparative Law*, p. 45; B. de S. Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, 1995, p. 290; Fitzpatrick, *supra* note 6.

8 Fitzpatrick, *supra* note 6, pp. 211-212.

9 B. de S. Santos, 'The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts', in J. Feest (ed.), *Globalization and Legal Cultures*, 1999, p. 75.

Santos concludes that court reform programmes better serve the needs of transnational greed ('hegemonic globalization') than of transnational solidarity ('counter hegemonic globalization'). These transnational conclusions derive from the domestic dimension of Santos's study of these programmes: their political impact on national elites and democracy. A legal regime consists of elites in the legislature and judiciary, but national legal cultures extend beyond these formal law makers to include lawyers and their clients, and more broadly still, citizens who decide how the law may relate to their own disputes or concerns over rights and wrongs. To cast more light on Santos's formulation it is necessary to discover more of how international programmes relate to the internal relationships within national legal cultures, that is to say between the law-making elites, other carriers of legal culture (such as lawyers and reformers) and the citizens.

Out of this discussion, the frame of reference guiding this inquiry may be set out as follows. Legal regimes may coexist with varying degrees of formality across a range of geographical spaces. 'Global', international or universalising tendencies may have their sources and their impacts in particular places or groups. Their sources may include legal, religious and political movements as well the interests of particular classes or elites. Their impacts, likewise, may benefit or disadvantage specific groups in various locations. They will also promote or inhibit particular political, social or economic projects. Applying such conceptions may lead to a more nuanced view of the interests at work, and their respective locations, than one which stretches in one dimension from the global to the local.

Likewise, in examining the sources of law this study seeks to open the frame of reference beyond the two traditional sites of international legal relations, identified by Fitzpatrick and Sassen as human rights and trade. These are the terms in which legal discipline understands two facets of international negotiations, but they may not reflect the way their sources are imagined or their impacts experienced.

It is also important to understand the impacts of internationalising programmes in their own terms. Transnational programmes are intended to have transnational impacts. If these programmes emanate from Washington or Chicago to be applied in client states across the globe, it seems likely that they will promote the convergence of laws, with United States or Western law as a model. Whether they succeed or not, and what other consequences they may have, can only be determined by a closer examination.

### **3. Parameters of the research**

The present study focuses on the law and court reform programmes of international financial institutions in an attempt to explore some of their impacts, intended and unintended, and mesh with local, national and international demands and interests. In addition to the formally negotiated conditions of IMF agreements and other such instruments, there is a remarkable plethora of legal reform programmes which emanate from the United Nations Development Program, the Asian Development Bank and the American Bar Association (ABA)<sup>10</sup> among many others. Amid this deluge of assistance offered to third-world countries to improve their government and legal institutions, the present study focuses on two which have been sponsored by those of the World Bank and the IMF.

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<sup>10</sup> I have named just three organisations whose legal programmes I have been invited to participate in or bid for. By way of declaring interests, the only ones in which I have been directly involved have involved teaching Vietnamese and Papua New Guinean court and legislature staff as postgraduate students funded by the UNDP and AusAID respectively.



Set up by the Bretton Woods agreement of 1944, the Bank and the IMF were two key institutions designed to ‘finance the rebuilding of Europe ... and to save the world from future economic depressions’.<sup>11</sup> Their role has expanded, with the Bank moving into a variety of development assistance programmes. In the mid 1990s both organisations increased their emphasis on the governmental and structural conditions of effective development programmes. In 1996 the IMF adopted a policy of ‘promoting good governance in all its aspects, including ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption’.<sup>12</sup> Stung by criticism of some of its more unsustainable projects, the Bank, too, was already moving to greater recognition of the political and social context of its programmes.

The two projects discussed below illustrate the roles of these respective organisations in promoting legal institutions in developing countries. The Venezuelan project consisted of a World Bank loan to improve the country’s judicial infrastructure. In Indonesia I focus on one of a number of internationally-sponsored law reform projects of the late 1990s: a project to reform the bankruptcy law and establish a commercial court as a condition of an IMF loan which would bail the country out of a major financial crisis. I have selected these projects for their differences as well as their similarities. While both regimes were in need of money, there was less urgency in Venezuela where the World Bank project offered incentives to proceed with a judicial reform programme.

In Indonesia, on the other hand, in the midst of a severe financial crisis, the IMF, as a lender of last resort, made particular legal reforms a condition of the loans urgently needed by a government in crisis. There had been a background of increasing activity in intellectual property and commercial law reform, much of it sponsored or promoted by international agencies, through the 1980s. A new Administrative Court was established in 1991. There had also been a World Bank sponsored court reform programme, from 1995, which had similar broad aims to the Venezuelan case. The IMF intervention in Indonesia in 1997-98 brought these events into sharp focus, and my interest here targets the establishment of the Special Commercial Court and the related drafting and implementation of a new bankruptcy law by that court.

I set out to understand more about how these transnational programmes interact with local and international interests and legal regimes, and to gain some understanding of their *modus operandi* and outcomes. This does not purport to be an evaluation of either programme, but it does seek to see them in their social and legal context, and to make some broad comparisons.

The particular focus of these studies is on their institutional origin in international finance agencies, and on their relationships with and impact on a variety of aspirations and interests in the host country. Santos asks whose political interests are served by transnational programmes. I focus here on the legal interests existing in the client state and the way these relate to political agendas, specifically asking which interests are harnessed, satisfied or promoted by the programmes. Those interests need not be material interests alone; they may appeal to or derive from broader values, aspirations and loyalties.

My orientation in this research is toward those of the greater number of people in the client states. While much of the documentary material available on these programmes addresses the role of elites and powerful interests, in each of these cases there is some research material available on the perceptions of justice of the mass of people. Even though it was not possible to

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11 J. Stiglitz, *Globalization and Its Discontents*, 2002, p. 11.

12 ‘Partnership for Sustainable Global Growth’ 29 September 1996. IMF, *Good Governance: The IMF’s Role*, 1997, IMF <http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm>.



judge the final impact of these programmes on such people, I try as far as possible to privilege their viewpoints.

The research was undertaken during and after the period being considered. It is based mainly on documentary sources, including those publicly available from the IMF and World Bank, contemporaneous media reports and academic and legal commentary. This was supplemented, in the Venezuelan case study, by interviews with reformers, project officers and World Bank staff in Caracas and Washington in 2001. There is some information available on the impact of these programmes on the form and practice of domestic law, and it will be possible to draw some tentative conclusions as to how this influence operates: the ways in which particular goals have been set and met, and the mechanisms by which the reforms were implemented. This involves looking beyond the official statements and legal documents, to see more of the institutional and social setting in which they occurred. As will be seen, the different answers to these questions between the two case studies make for useful comparisons.

It is not intended to address the issues of legal convergence or legal pluralism, but rather the research is informed by a pluralist paradigm which accepts that formal and informal law, derived from different sources of authority, may coexist. This is an uncomfortable though not impossible coexistence in the realm of national and written law. However, it does coincide with many people's everyday experience of law. To better understand that experience it is necessary to see the reform programmes at work, to understand people's views of the law and the legal institutions, and to understand them in the context of broader social values by which people orientate their lives and their sense of justice and injustice. In Fitzpatrick's formulation law represents certain claims to universality, albeit enacted at local levels. To discover more about the values informing judgements of the law and of justice, it will be necessary to consider the universal as well as the local horizons of those legal subjects.

These are ambitious questions, and my answers will be tentative. However, by asking these questions and applying some of the existing theoretical insights to an analysis of concrete situations, I hope to theorise the issues more adequately and to point towards further possible empirical work.

The programmes I am considering were both established during the 1990s and coincided, in both Indonesia and Venezuela, with periods of economic difficulties and rapid political change. The programme in Indonesia was launched by a letter of intent (LOI) of April 1998 specifying the conditions to be met if the IMF was to advance the government a loan in the midst of a profound financial crisis. President Soeharto fell from power the next month, and subsequent leaders (Presidents Habibie and Wahid) attempted to initiate legal and political reforms against the backdrop of this crisis and in conformity with IMF conditionalities. I follow the Indonesian experience through the rushed introduction of bankruptcy laws to the establishment of the Special Commercial Court and the experiences of that court in deciding a number of bankruptcy cases in its first years of operation.

The programmes in Venezuela were funded by loans from the World Bank in response to needs for judicial reform recognised in Caracas. The background to that recognition is outlined below: the notable difference from Indonesia is the local initiation of the intention to reform. In this study I consider a ten-year period from the approval of a US\$30 million loan to a ten-year Judicial Infrastructure Project, from 1992 to 2001. During that period a further US\$7.3 million was committed in 1997 to a project of 'modernization' of the Supreme Court. The crisis stimulating the Venezuelan projects had its roots in the judicial system, and subsequently became more deeply involved in the political divisions in the country following the election of Hugo Chávez

as president. The country was facing financial difficulties during the study period which have since been alleviated to some extent by the increasing price of oil.

#### 4. National and cultural backgrounds

##### 4.1. Venezuela

From its position in the mid-twentieth century as one of the most affluent nations in South America, Venezuela has felt the impact of political and financial instability over the last generation. In 1991 public outrage over judicial corruption led to a widely-supported manifesto calling for the resignation of the Supreme Court judges, and a year later a young officer, Hugo Chávez, led a military coup which was quickly put down. By the end of the ten-year period, Chávez was back in power, having served time in jail and having been popularly elected as president in December 1998.

A period of relative affluence derived from oil exports had come to an end, and a crisis of public confidence in the judiciary, focused on corruption, coincided with a banking crisis in the early 1990s. The poor reputation of the courts for efficiency and impartiality was reflected in the low number of cases filed in courts which continued to drop, since companies avoided the courts other than to collect debts from individuals or small businesses (when they already held a security).<sup>13</sup> Other barriers to popular access included the need to be represented, the high cost and the lack of comprehension.<sup>14</sup>

Judges had been elected by Congress until a struggle for reform in the 1960s, which became a 'conscious struggle for political control of the judiciary'. A Judiciary Council was created in 1969 which was highly politicised. 'Reciprocal accusations among the magistrates of fraud in the selection of judges or use of the council for political clientelism' led to the judiciary being held in lower regard than any other branch of government, and the judicial council was abolished after the 1999 election.<sup>15</sup>

The networks ('tribes') of clientelism were well established within the judiciary but reached out to include lawyers and politicians.<sup>16</sup> Judicial corruption became a major issue in the 1990s, following the *Carta de los Notables* (a public manifesto about governance and corruption, 1991, which called for the resignation of the Supreme Court judges and the judicial council),<sup>17</sup> and the Chávez military coup attempt (1992). It was moderated somewhat after this and with the dismissal of president Pérez for corruption by the Supreme Court in 1993. This is the background sketched by Pérez-Perdomo to the Venezuelan government's approach to the World Bank for a loan to improve the quality of its 'judicial infrastructure'.<sup>18</sup> The period of my study of Venezuela coincides with the currency of this ten-year loan, for a succession of projects, from 1992 to 2001.

While Venezuela has always had workers and peasants, with demands for a more equal distribution of wealth, recent times have seen a drastic shrinkage of the middle class. With political instability and increasing concerns over crime and disorder there have also been increasing demands for reforms to the justice system. These related aspirations for economic equity and social justice were voiced by President Chávez, enhancing his popular appeal.

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13 R. Pérez-Perdomo, 'Venezuela, 1958-1999: The Legal System in an Impaired Democracy', in L.J. Friedman *et al.* (eds.), *Legal Culture in the Age of Globalization: Latin America and Latin Europe*, 2003, pp. 448-449.

14 *Ibid.*, pp. 453-45.

15 *Ibid.*, p. 450.

16 *Ibid.*, p. 451.

17 *Ibid.*, p. 455.

18 *Ibid.*

Whether or not the President had any realistic programme to address economic issues of equity, the economic and political constraints on the Venezuelan government left little room for manoeuvre in the early years, though this may have changed subsequently with the increasing price of oil. The reforms initiated by the World Bank programme were increasingly mixed up with changes implemented by the Chávez regime, as will be seen in more detail below. The period of my study ends before an attempted coup d'état against Chávez, led by business interests, in April 2002, and increasing concern over the diminution of democratic and legal institutions which may flow from some of President Chávez's subsequent constitutional reforms.

The gulf separating the poor in rural areas or barrios from the rich in the cities is illustrated in the perceptions the poor have of the justice institutions. Alienation from the justice system is so great in the barrios that incidents of rape or murder may be dealt with by 'executions rather than recourse to police and formal legal mechanisms'.<sup>19</sup> A survey of attitudes to courts in four poor communities of Barquisimeto and Barcelona found that only 17% believe judges to be impartial. Some 91.7% of respondents believed that judges are highly influenced by economic power, while 75% considered that they were influenced by political parties and 58.3% by government.<sup>20</sup> The predominance of economic and political power is significant in these findings, reflecting the widespread perceptions of corruption of the justice institutions based on economic inequality and on the political parties. Consequently dispute resolution, apart from the drastic measures already mentioned in relation to rape and murder, tends to focus on informal mechanisms mobilising communities and calling on leaders and the media to denounce wrongdoers or redress complaints. Pérez, Richter and Roche also see this as a result of both the mistrust of the formal institutions and Venezuelan cultural discouragement of formal conflicts.

#### 4.2. Indonesia

The opinion survey results from Venezuela are not unlike those obtained in a survey of citizens' perceptions of the justice institutions in Indonesia. With a focus on 'citizens' rather than the poor, this survey of urban, semi-urban and rural communities in Jakarta and five provinces on the islands of Java, Sumatra and Sulawesi found a distrust of police and the general courts. These were widely seen to be corrupt, unreliable and in the service of the wealthy. While the proportion of those seeing judges as corrupt is not comparable with the Venezuelan figures, 57% of respondents believed the legal system was 'as corrupt as it has ever been'. Respondents were most familiar with local and informal dispute resolution procedures, 93% and 74% being familiar with community and religious leaders respectively, and least familiar with general courts (25%).

The clearest difference between the Indonesian and Venezuelan results is seen in the role of the Indonesian religious courts. I have mentioned above that the independent Indonesian state inherited a tripartite system of courts, applying civil law, religious law, and customary (or *adat*) law. Those institutions which were seen as 'effective' in the Asia Foundation's Indonesian survey were 'community leaders, religious leaders and religious courts', who were generally thought of as 'trustworthy', 'helpful' and 'the first to go to with a legal problem'.

Indonesia may be seen as something of a laboratory of legal pluralism where strands of civil, Islamic and customary law have been established since the period of Dutch colonisation. Indeed, the very establishment of the customary or *adat* law has been traced to long-standing debates among European legal scholars going back to Savigny and played out in the Netherlands

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<sup>19</sup> Interview with C.L. Roche, Universidad Central de Venezuela, 5 March 2001.

<sup>20</sup> N. Pérez, J. Richter & C. L. Roche, *Voices of the Poor for Justice* (Paper presented at the Law and Society Association and Research Committee on Sociology of Law, Budapest, 4–7 July 2001).

between groups based at Utrecht and Leiden. Having seen the systematising and unifying approaches to law championed at Utrecht gain prominence in Europe, Cornelis van Vollenhoven of Leiden looked to the Dutch colonies in the Indies as a more promising site to apply principles of legal pluralism.<sup>21</sup> A pluralist approach suited the colonial authorities, as a means of both distinguishing the law applied to Europeans from that applied to the locals<sup>22</sup> and as a counterbalance to Islamic influence.<sup>23</sup> Expediency combined with a theoretical pluralism in the Dutch Indies to promote the coexistence of Islamic, customary and Dutch civil law.

While the Dutch authorities and their Indonesian successors may have been pleased to divide universalist Islamic law from local customary law, while attempting to strengthen national law, there was a steady increase in the organisation and centralisation of the Islamic courts.<sup>24</sup> Not only was national law emphasised as distinct from adat or shari'a law, but adat and shari'a have been seen to be in competition with each other. Such disputes revolved around the strength of attachment to Islamic scriptures. If advocates of adat emphasised the 'local-ness' of Indonesian Islam, proponents of Islam countered that this was no different in the rest of the Muslim world: accommodation of local custom was no barrier to the application of shari'a.<sup>25</sup> In any case, civil, adat and shari'a courts were established side by side under the authority of the state. If adat competed with Islam in the establishment of a national system of courts, in local practice they are more accommodating. Bowen has found that courts in the community of Gayo (Aceh) 'have studiously avoided opposing adat to Islam, custom to law'. By emphasising both local custom and religion, and by invoking 'consensus', as a 'linkage between political ideology and ongoing social life' religious judges retain a role in the 'active interpretation of law and of society'. Deriving from the need to maintain local relevance Islamic courts are more likely to support than to undermine local customs.<sup>26</sup> This stance is reflected in the esteem in which such courts are held.

The law establishing the religious courts after independence was largely procedural, basing their structure and rules of evidence on a secular model. Their jurisdiction is limited to private matters such as family law and inheritance. A widespread revival of interest in religion and Islamic law, in connection with demands for reform in Indonesia has seen changes in national law as well as local judgment. At the national level the compilation of religious law during the 1980s led to its codification in 1991. Major themes of these moves involved the reconciliation of adat or customary law with shari'a Islamic law. These moves have not, however, undermined the mix of legal regimes in Indonesia, nor have they established any clear cut religious authority. Hooker has pointed to the distinct sources of authority of religious law –in revelation–and of national law – in the constitution. Neither codification nor pluralism has challenged the fundamental Indonesian reality that executive power is paramount. Even the religious courts are firmly under the national executive through their administration by the Ministry of Religion.<sup>27</sup>

If Indonesian legal pluralism can be seen as a means of separating and weakening diverse sources of power (religious, local customary leadership, urban elites), we may note that the

21 D. Bouchier, 'Positivism and Romanticism in Indonesian Thought', in T. Lindsey (ed.), *Indonesia: Law and Society*, 1999, pp. 188-90.

22 C.A. Coppel, 'The Indonesian Chinese as "Foreign Orientals" in the Netherlands Indies', in T. Lindsey (ed.), *Indonesia: Law and Society*, 1999, pp. 36-37.

23 While there were champions of a pluralist approach to Islamic law, this was difficult to sustain in the face of Islam's own universalism as an international religion. 'Islam had few dedicated sympathizers among Europeans, men who would cheer for an Islamic victory over adat. Islam was too universal in its appeals, too threatening in European memories, and potentially too powerful; Islam was altogether unfamiliar.' D.S. Lev, *Islamic Courts in Indonesia: A Study of the Political Bases of Legal Institutions*, 1972, pp. 16-17.

24 *Ibid.*, Chapter 3, *passim*.

25 M.B. Hooker, 'The State and Syariah in Indonesia 1945-1995', in T. Lindsey (ed.), *Indonesia: Law and Society*, 1999, p. 98

26 J.R. Bowen, 'Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960-1994', 2000 *Law and Society Review* 34, p. 124.

27 Hooker, *supra* note 25, p. 98.

various bases can, nonetheless, find a common target. The dominance of the executive government can be seen by all as a barrier to the rule of law, whatever that law may be. Since the 1980s a variety of interests and elites have rallied around calls for a *negara hukum* (a literal translation from the Dutch *rechtstaat*, to which the 1945 Constitution referred<sup>28</sup>) which would found rule in law rather than the naked power of the rulers. The demand for a *negara hukum* arose in parallel with an interest in the codification and reconciliation – procedural and substantive – of shari'a law with customary laws.<sup>29</sup> The demand that leaders respect a formal and predictable law has also been a key demand of liberal urban elites during the same period. Demands for law reform in Indonesia focus with particular urgency on human rights and criminal law. 'In Indonesia the primacy of criminal procedure accurately reflected the primacy, for reformers, of fundamental political issues underlying the struggle over law and legal process'.

Partly in response to demands for a *negara hukum*, by the 1990s law reform was extending to the development of specialised courts within the framework of Western law, beginning with an Administrative Court in 1991. This court was applauded for some high-profile cases in which the judges upheld citizens' rights against government decisions even though, as Bouchier points out, decisions of this sort were limited to the lower echelons of the government.<sup>30</sup>

By the mid 1990s a 'small law reform movement' supported by 'a handful of academics at the University of Indonesia and a smattering of indigenous lawyers' went further, into areas of commercial law. The World Bank sponsored Bappenas report recommended the establishment of a specialised Commercial Court, and USAID provided technical support for drafting a new bankruptcy law.<sup>31</sup> In 1995 the World Bank supported the Indonesian government in a programme aimed at overcoming widespread judicial corruption, while the pressure built on Indonesia to stamp out widespread copyright piracy<sup>32</sup> with a WTO agreement in the late 1990s requiring law reform particularly in the area of intellectual property.<sup>33</sup>

The reform programmes that were introduced as a condition of IMF loans in 1998 may be seen against the background of this national legal history and home-grown moves to integrate customary law with Islamic law, coming together with a general interest in the rule of law. During the 1990s these agendas increasingly converged with and were overtaken by foreign demands for Indonesian law reform.

These cultural understandings of law in Venezuela and Indonesia form the background to the international law reform programmes which have been introduced into the two countries, to which I now turn.

## 5. The reform programmes

### 5.1. The 'bankruptcy of law' in Indonesia

Pressure for reform of commercial law, whether from local lawyers or international agencies, had seen little progress in Indonesia before the financial and political crisis of 1997. During the 1990s

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28 T.M. Lubis, 'The *Rechtstaat* and Human Rights', in T. Lindsey (ed.), *Indonesia: Law and Society*, 1999, p. 171.

29 Neither constitutes a demand for unalloyed shari'a law, let alone Islamic fundamentalism.

30 D. Bouchier, 'Magic Memos, Collusion and Judges with Attitude: Notes on the politics of law in contemporary Indonesia', in K. Jayasuriya (ed.), *Law, Capitalism and Power in Asia*, 1999, pp. 240-242.

31 B.G. Carruthers *et al.*, 'Negotiating globalization: global scripts and intermediation in the construction of Asian insolvency regimes. (Global Processes, National Institutions, Local Bricolage: Shaping Law in an Era of Globalization)', 2006 *Law and Social Inquiry*, 31(3), p. 550.

32 A. Rosser, 'The Political Economy of Institutional reform in Indonesia: The case of intellectual property law', in K. Jayasuriya (ed.), *Law, Capitalism and Power in Asia*, 1999, pp. 95 *et seq.*

33 H. Juwana, 'Reform of Economic Laws and its Effects on the Post-Crisis Indonesian Economy', 2005 *The Developing Economies* 43(1), p. 73.



the IMF had made various efforts to rein in the excesses and corruption of the Soeharto government, with little impact. In the midst of political as well as economic turmoil in April 1998, a Letter of Intent (LOI) was produced by the IMF and the Indonesian government, intended to stabilise the currency, restructure the banks and privatise government assets. A key element of the strategy contained in the LOI was an overhaul of the bankruptcy law, which was at that time based on the Dutch colonial Bankruptcy Act of 1905.<sup>34</sup> Juwana sees the objective of the law as to make it easier for foreign banks and investors to claim monies owed to them by Indonesian firms.<sup>35</sup> The reforms were ‘to overhaul the bankruptcy system and establish a court system that will provide for fair, transparent and expeditious resolution of commercial disputes’. Noting that the law would have little impact ‘unless it is enforced by an effective judiciary’, the LOI provided for the implementation of a Special Commercial Court.<sup>36</sup> By August, four months later, a bankruptcy law had been drafted, a specialist court was established, and judges and receivers had been trained.

The Indonesian government was divided as to how much scope it had for negotiation, the finance ministry wanting a quick resolution on any terms to secure the IMF refinancing, while the justice ministry was more concerned with the nature and detail of the law. On the side of the IFIs, the World Bank could claim superior local knowledge and expertise, through its experience on the Bappenas report, and a number of staff, mainly expatriates either based in Jakarta with the Bank’s subsidiary, the International Financial Corporation, or having experience of Indonesia and debt-related issues. The IMF had no such expertise, but nonetheless assumed the leading role in negotiations with Jakarta.<sup>37</sup> While Lindsey and Neilson see the law as having been drafted in great haste by a Dutch lawyer, Carruthers and Halliday name a number of experts involved in the detail of the law reform process, including the Dean of law at the University of Indonesia (who had been involved in the Bappenas report) and an expatriate member of his law firm, as well as Dutch and US lawyers. Whoever was ultimately responsible for the form of the law, it was certainly pushed through quickly: it was enacted in the first instance by government regulation four months after the letter of intent, and ratified by the parliament a month later.<sup>38</sup>

While the Commercial Court received 100 filings in its first year of operation (1999), these have steadily declined to the point that there were only 12 in 2003 up to May.<sup>39</sup> It appears that the court, or the laws that it enforces, have not been able to overcome the reputation they acquired in the first years of operation. Complaints and concerns have included questions of the judges’ partiality (at best) or corruption, allegations of overseas interference, and criticism of the unworkability of the bankruptcy law that had to be applied.

The most controversial cases decided by the Commercial Court have involved suits against solvent companies for non-payment of debts. In the first such case PT Modernland Realty was bankrupted by purchasers of apartments that the development company had not delivered.<sup>40</sup> Subsequently, policyholders sued insurers for payment of disputed insurance claims,<sup>41</sup> and a contractor sued PT. Unilever Indonesia Tbk. when its contract was not renewed. The most

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34 *Ibid.*, p. 76.

35 *Ibid.*, p. 80.

36 Indonesia – Supplementary Memorandum of Economic and Financial Policies, 10 April 1998, Appendix VII. <http://www.imf.org/external/np/loi/041098.htm>, accessed 25 June 2002.

37 Carruthers, *supra* note 31, p. 552.

38 Juwana, *supra* note 33, p. 77.

39 *Ibid.*, p. 84.

40 *Drs. Husein Sani et al. v. PT Modernland Ltd*, cited Juwana, *supra* note 33, p. 83.

41 One such case was settled out of court (Juwana *ibid.* p. 83), while another was dismissed by the court in a decision hailed by the *Australian Financial Review* as ‘winning back the confidence of foreign investors’ the week before the Finance Minister expected to sign a new agreement with the IMF. T. Dodd, ‘Case Restores Investor Faith’, *Australian Financial Review*, 24 August 2001, p. 22.



celebrated 'test' of the law in the eyes of the financial institutions saw a bankruptcy ruling against Asurani Jiwa Manulife Indonesia (AJMI), in a decision of the Commercial Court in mid June 2002. In 2001 the Canadian-based insurer Manulife bought out its Indonesian partner PT Dharmala Sakti Sejahtera (DSS), itself bankrupted under the new laws in 2000.<sup>42</sup> In addition to the majority shareholding by Manulife Financial (a Canadian insurance company) DSS owned 40% and the World Bank's International Finance Corporation 9%. The case against AJMI was brought by the receivers of the bankrupted DSS, claiming that AJMI owed a dividend from 1999. The international investment community and the IFIs were appalled that an indisputably solvent company could be bankrupted over a disputed debt.

The failure of the new bankruptcy law and the Special Commercial Court to uphold the interests of Canadian insurers and World Bank investors, in a case which they took to be fairly straightforward under Western conceptions of bankruptcy law, led to widespread criticism of the Indonesian system in Western financial circles and high-level representations by the Canadian government to Indonesia. The judges in the initial case were investigated for corruption and subsequently cleared, and AJMI appealed to the Supreme Court and had the decision overturned in mid 2002. When DSS again filed for compensation from Manulife the Indonesian parliament called on the government not to allow foreign interference in the case. Given the Canadian government's earlier representations, the Supreme Court's reputed closeness to the government and its rapid decision against DSS, this had been a widespread perception in Indonesia.<sup>43</sup>

Western interpretations of this case (the others have received little media attention) refer to the corruption of the Indonesian judiciary and the unreliability of Indonesian law.<sup>44</sup> Indonesian commentary focuses on the representations by the Canadian government and concerns that the Indonesian government responded by leaning on the Supreme Court. Few have noted the fundamental problems in the bankruptcy law itself.

'The objective of the enactment policy advocated by the IMF was mainly to protect the interests of foreign creditors. This can be clearly observed in the provision of Article 1 (1) of the Bankruptcy Act which does not consider whether a debtor is solvent or insolvent. The only requirement of this article is that the debtor has failed to repay one of its debts.'<sup>45</sup>

Indonesian reformers have been enthusiastic advocates of a *negara hukum* since the days of Soeharto, but the reforms they have seen at the hands of the IMF and the World Bank have been unsympathetic to local concerns and unsupported by local commentators, who have referred to the 'bankruptcy of law' in the wake of the 1998 reforms. Lindsey sees the 'botched introduction' of the bankruptcy laws as exemplary of the dangers of

'the most ominous words in the history of comparative law ... "we are here to help you," a refrain often heard as the latest "green beret" law reform team is airdropped into Jakarta armed with draft laws from their own jurisdictions and tight timetables for implementation. ... The content of and, in particular, the deadlines for, the bankruptcy reforms did not

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42 Juwana, *supra* note 33, p. 83.

43 'Antara, House to Oppose Foreign Intervention in DSS-AJMI Dispute', *Antara News Agency wire*, 23 July 2004; cf. 'Indonesia Tells Canada to Back Off over Manulife', CNN.com, 24 June 2002, <http://asia.cnn.com/2002/BUSINESS/asia/06/21/indonesia.manulife.reut/>, accessed 25 June 2002.

44 W. Caragata, 'A Deal is Not a Deal: The Manulife buyout and other tales from Jakarta's legal jungle', *Asiaweek* 7(6), 16 February 2001. <http://www.asiaweek.com/asiaweek/magazine/nations/0,8782,98451,00.html>, accessed 25 June 2002.

45 Juwana, *supra* note 33, p. 80.

reflect an Indonesian agenda but were largely dictated by the IMF and the World Bank [who] were at least as concerned about short-term issues of their own credibility as much as the long term aim of introducing effective legal reform in post-Soeharto Indonesia.<sup>46</sup>

## 5.2. Court reform in Venezuela

The World Bank's programmes in Venezuela have also lived through interesting times. In 1992 the Bank committed a US\$30 million loan to a ten-year Judicial Infrastructure Project, aimed to 'improve Venezuela's enabling environment for private sector development and reduce both the private and social costs of justice'.<sup>47</sup> In 1997 it committed a further US\$7.3 million to a project of 'modernization' of the Supreme Court. In 1992 Hugo Chávez had attempted a coup d'état, and in December 1998 he was elected President in a landslide election. The following year he established a Constituent Assembly to overhaul Venezuela's constitution, and by the end of 1999 had renamed the country the Bolivarian Republic of Venezuela, after the nineteenth century pan-American liberator Simón Bolívar, and changed the name of the country's highest court to the Tribunal Supremo de Justicia.

Chávez's justice reforms were more than changes of name. Under the Decreto de Emergencia Judicial, the ruling body of the judiciary, the Judicial Council (which had a judicial representative and a majority appointed by parliament) was dismissed and replaced by a Judicial Commission under three directors.<sup>48</sup> Subsequently a system of performance measures of the judiciary and assets registers was established, with reviews carried out by 'juries' including lay people and academics. Clearly these moves have threatened the independence of the judiciary, but the appraisals of judges and tighter controls on corruption showed some signs of efficacy.<sup>49</sup>

Throughout the period of the World Bank programmes in Venezuela, which predate Chávez and the Bolivarian constitution, there has been substantial interaction and cooperation between the government, the Judicial Council (before it was replaced) and the non-government sector. Human rights organisations and academics have been consulted about the reforms and their personnel have been appointed to key positions in World Bank programme areas.

The World Bank programmes covered a range of areas of court and procedural reform which dovetailed into other domestic capital works and law reform programmes in complex ways. With a view to making Venezuelan courts 'more efficient, transparent, modern and independent', the Judicial Infrastructure Project emphasised information systems, administrative procedures, training and built courtroom infrastructure. The World Bank assisted the Judicial Council in appointing consultants to develop a national master plan which highlighted priorities for courthouse redevelopment in cities across Venezuela. Problems included the use of rented office space rather than purpose-built courts. New courts in the state capitals of Barcelona and Barquisimeto and the national capital Caracas have been funded by the Venezuelan government which broadly tie in with the procedural and infrastructural requirements identified through various reform programmes, including domestic ones. While it is possible to trace the source of funds for any particular project, the origin of the reform ideas is less clear. It may actually be one of the strengths of the Venezuelan projects that the various reforms have overlapped in confusing ways. I return in conclusion to a consideration of the synergy and interest group 'ownership' of various reform programmes.

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46 T. Lindsey, "'Corruption' as Rational Response in the Aspal State", in D. Duncan *et al.* (eds.), *Indonesia After Soeharto: Reformasi and Reaction*, 1999, p. 177.

47 <http://www4.worldbank.org/sprojects/Project.asp?pid=P008233>, accessed 25 June 2002.

48 The first Judicial Commission was appointed by the body set up to reform the constitution, the Asamblea Nacional Constituyente.

49 *El Nacional*, 7 March 2001; and interview with C.L. Roche, Universidad Central de Venezuela, 5 March 2001.

In addition to improved information and communications technology (ICT), which continued under the Modernization Project, the key procedural reforms included the introduction of oral process, initially in criminal trials, and a single filing system for each courthouse. The importance of these simple procedural and architectural devices cannot be appreciated without an understanding of the pre-existing problems of the Venezuelan judicial system. Widespread delay and concerns over corruption were of particular concern. In the original system, still in place in the lower civil courts in Caracas, each judge presides over a court which handles all aspects of a case from filing to disposal. In a particularly bureaucratic version of the civil law tradition, virtually all public contact is with the clerks in an office area open to staff and public alike. The judge is isolated behind closed doors. The introduction of a single filing desk means that lawyers can no longer select the judge with whom they will file their cases. Greater separation of public and staff reduces the perception of and the opportunity for corruption, obviously without necessarily eliminating either. These are clearly architectural as well as procedural issues.

The introduction of oral process is an instance of legal convergence in the area of procedure. It is obviously typical of common law countries, and is gaining wider acceptance in the civilian world. The present research cannot determine whether in the case of Venezuela this is a home-grown emulation of the common law, a result of US AID programmes in the 1980s, or was derived from Argentinian and German reforms. All these reasons have been suggested and may be plausible in varying degrees.<sup>50</sup> The reasons given for the introduction of oral process include greater transparency, efficiency and expedition. At the time of my visit to Venezuela oral process had been introduced in criminal trials but not yet in civil. Courts need to be specially designed to allow for transparent oral procedures and this has been done in the new complexes mentioned above.

The rate of acceptance of some of these reforms has been slow among the judiciary and the legal profession. For this reason, and also to promote another reform – criminal investigations by the procuracy (Fiscalía) rather than the police – the second project addressing ‘Modernization’ was introduced into the Supreme Court. This was particularly aimed at trialling and demonstrating new procedures in the nation’s highest court in the hope that this would promote judicial acceptance and model their adoption in lower courts. Proponents of each of these projects emphasise the aim of increasing citizen participation. The increased use of ICT in the Supreme Court, with lists and other information published on the web and public access to networked computer terminals, is a tangible manifestation of this aim, which seems otherwise to be rather ephemeral.

In this context it is worth mentioning another initiative funded by the World Bank in Venezuela. ‘Voices of the Poor for Justice’, some of whose results were discussed above, has been an initiative of the World Bank in a number of areas. In Venezuela the Bank funded a group of socio-legal researchers from the Universidad Central de Venezuela to investigate perceptions of the justice system among the poorer sections of the Venezuelan population.

World Bank projects in Venezuela have been oriented to procedure and infrastructure to a greater extent than towards the substantive law. However, the aims of these projects have tied in with deeper procedural reforms, such as the reforms of criminal procedure initiated by Venezuelan institutions. By targeting those aspects of the law and procedure which facilitate the operation of the courts, the projects have avoided the obvious infringements of sovereign

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<sup>50</sup> Interview with W. Malik, World Bank, 5 April 2001.

legislative power which are so apparent in Indonesia. The projects have also reached beyond Caracas to improve court facilities and programmes in state capitals, though the Modernization Project has retreated to the Supreme Court. Since the projects remained active for a considerable period, under different regimes, and at the invitation of the government rather than as an IMF conditionality, they were able to gain broader acceptance and commitment than less locally-grounded projects.<sup>51</sup>

Of particular interest in the case of Venezuela is the increasing involvement of the World Bank in criminal courts and procedure. While the first (1992) project aimed to improve the 'environment for private sector development and reduce both the private and social costs of justice', later developments indicated a willingness to deal with criminal law. This is seen by some participants as significant since it is the area of law which most affects the poor and has the greatest bearing on human rights. It signifies an attention shift by the Bank from projects, such as the bankruptcy law reform in Indonesia, which benefit capital and investment into areas of widespread popular concern.

## 6. Global law or local process?

There are complex interactions of the global and the local running through these case studies of international programmes aimed at reforming the law of client states, whether through World Bank loans or IMF conditionalities. The nation itself has acted as an intermediary in Venezuela more effectively than in Indonesia, while in both cases the programmes have outlived the national regimes that originally sponsored them. Does this mean the programmes have a life of their own, reaching across the nation state to implement changes to national law and justice systems in spite of the national politicians? While the nation may be only one player in these arrangements, and specific regimes may even be dispensable to the process, the limitations to the implementation of these programmes indicate the powerful role played by domestic institutions and civil society.

In Indonesia the new bankruptcy law was perceived as having been implemented by outside forces with little relevance to local conditions. Despite the powerful local reformist agenda calling for a *negara hukum*, the bankruptcy reforms show no evidence of meshing with these concerns. Western concerns have focused on the tribulations of Manulife, a Canadian company whose Indonesian subsidiary is partially owned by the World Bank, in its protracted litigation with the local Indonesian company DSS. The Indonesian people's perception that courts are remote and corrupt can only be compounded by these international machinations at the level of corporations law. Not only are the international institutions seen to be manipulating the reform agenda, but they have ended as parties in the courts they helped to create, litigating laws they had written. If this sorry experience for Indonesian observers has any redeeming features it may lie in the hope that the judges are not simply corrupt but are playing to the home crowd and looking after Indonesian interests against foreign capital. I have no evidence to suggest that this has been either the reality or the perception as a result of the 2002 decision over Manulife. But it cannot escape attention that the international financial institutions have focussed their attention on corporate law, or that the beneficiaries of reform and Western-style rule of law are intended to be Western interests.

These concerns are remote from those of the Indonesian citizens and reformers. Indonesian Islamic legal intellectuals and religious court judges have been active in reconciling custom and

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51 This is not to say that the relationship between the Chávez regime and the World Bank continued to be so cordial. Each of the projects discussed here was to end in mid 2001, and the present study has not considered events since that date.

the law. The actions of the courts in this endeavour are recognised by the people, earning their trust in the religious courts. The pluralism of institutional Indonesian law offers alternative sources of legal authority, so that religious, traditionalist or secular reformers can each find hope in the idea of the rule of law, even though they may differ on the foundation of that law. This has led to some commonality of interest with secular reformers who have focussed on the Dutch notion of a *rechtstaat*, and rendered this demand into a popular Indonesian demand for a *negara hukum*. Criminal law, human rights and judicial corruption are at the centre of these local reformist demands, and yet the IMF programmes limit their scope to commercial laws, including intellectual property law and judges of the commercial court. The single-mindedness with which the IMF approached the commercial interests of foreign investors and other commercial interests contrasts with the diversity of views and interests found among Indonesians with a concern for law.

Some aspects of the Venezuelan experience contrast with this picture. The World Bank projects there have attracted acceptance by some reformers for their willingness to deal with criminal law, and by extension human rights. Those reformers have become involved in the programmes through working on the Modernization Project, on research projects and with the World Bank itself. It is not difficult for a wealthy international organisation to coopt local opposition, or for critics to identify these motives. However, the World Bank programme can be seen to have engaged with a range of local interests, and to have worked with those interests in research projects and reform activities. There was some convergence among reformers and the Bank in Venezuela around issues of corruption, rights and local reforms. It remains unclear whether the World Bank projects in Venezuela really improved human rights or dealt with corruption. However, cooperation between the government and law reformers led to the implementation of a broad agenda of reforms, which certainly improved the prospects of reform. Throughout the study period cross-currents of broader political events, reform and reaction emanating from lawyers, the courts, reformers and the government made it difficult to identify unique impacts or outcomes of the World Bank's agenda. In the early years of the Chávez regime, attacks on judicial corruption were seen as effective and encouraging by some reformers, even while new judicial governance structures were seen as limiting judicial independence. Any assessment became impossible after the failed coup against Chávez, when law reforms were subsequently overtaken by more radical constitutional changes of the Chávez regime and the further polarisation of Venezuelan politics.

These comments simply highlight the fact that no legal or judicial reform programmes, whether home-grown or foreign-sponsored, operate in a political vacuum. They are rife with unintended consequences, and are subject to the vagaries of shifting local and international alliances. Where they have broad-based support in the country in which they are being implemented they can potentially foster alliances around their own and related agendas, as seen in Venezuela. Where they have been imposed by external interests, as in Indonesia, they may even unite disparate groups against them. If the former scenario can be seen as encouraging and creative, the latter is overwhelmingly negative. There was little benefit to reformers, judges or Western interests in the judicial rejection of the spirit of the reformed bankruptcy laws, whether this arose from corruption, incompetence or patriotic loyalty to local companies.

In both Indonesia and Venezuela the programmes derived from Washington and were implemented with at least the formal approval or cooperation of local elites. In the case of Indonesia this cooperation was, particularly in 1998, under considerable duress. In both cases the programmes set out with explicitly Western-oriented reform agendas, which purported to be universal in their claims. In Indonesia the focus was on bankruptcy law and the 'fair, transparent



and expeditious resolution of commercial disputes'.<sup>52</sup> In 1992 the World Bank aimed 'to improve Venezuela's enabling environment for private sector development'.<sup>53</sup> In both cases these programmes have come up against domestic demands for law reform which draw on different universalistic sources. In Venezuela the demands focus on social equity and freedom from corruption, deriving from an egalitarian human rights discourse. In Indonesia the demands for *negara hukum* and a *shari'a* law, whether conceived as essentially religious or reconciled with *adat*, refer to the European *rechtstaat*, to Islamic *fiqh* (jurisprudence) and to a legal version of indigenous Indonesian custom. The universal claims of international finance agencies for fairness, transparency and efficiency seem relatively hollow compared with these powerful legal ideologies.

The implementation and acceptance of legal reforms are not fought out purely at the level of ideology. In Indonesia the IMF focused on writing a law and developing a court to implement it. The Venezuelan reforms range from the local and physical to the national and institutional. Procedural, architectural and local reforms focused on the physical movement of civil files from the public to the court, and on the architectural space required to allow that movement and minimise opportunities for corruption. They investigated the architectural and procedural requirements to allow oral proceedings in criminal trials. At the national and institutional level the government implemented judicial performance appraisal, a register of judges' assets, juries to oversee this process and the suspension of a considerable number of judges as a result of this process. The interaction of internal civil society players, government and legal interests with the international programmes is so close that the origins of many reforms are complex and unclear. What is clear is that this has not all been one-way traffic: the initiatives for reforms have come from a variety of sources – civil, national and international – under different political regimes. There was continuing concern that the legal profession was not cooperating, and this constitutes an obvious limitation to the efficacy of the reforms.<sup>54</sup>

Global law cannot be implemented at the global level, nor can it be a deal stitched up between an abject client state and an international institution with massive, asymmetrical bargaining power. Law does not operate through the writing of statutes or national compliance with IMF conditionalities. In the nature of law, it is made and remade with each decision of a judge – as to the outcome of a case – or of a disputant as to whether to file a case in a particular court, or whether to take some alternative action to resolve a dispute. If internationally sponsored legal programmes are to gain any purchase in the legal life of local or national communities they must engage with the concerns of those communities. Those concerns are material, social and legal, embodying various cultures' conceptions of what is right, fair and relevant to them. Their sources are as diverse as the cultures that give rise to them. In these two case studies alone they were seen to derive from the European *rechtstaat*, Islam, indigenous custom, and egalitarian conceptions of social rights. They are played out in courtrooms, police stations, communities and government offices across the country. Convenient alliances forged between local elites, international finance agencies and transnational commerce may indeed have pernicious consequences in violence, the contraction of elites and their polarisation from disenfranchised citizens. This was seen particularly in the Indonesian example. Lasting reforms can only arise from local

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52 Appendix VII to LOI 10 April 1998. <http://www.imf.org/external/np/loi/041098.htm>, accessed 25 June 2002.

53 <http://www4.worldbank.org/projects/Project.asp?pid=P008233>, accessed 25 June 2002.

54 There are obviously numerous competing interests with their own conflicting views on the nature and direction of the reforms, in both Venezuela and Indonesia. Local opinions may not converge around one point of consensus as to whether these reforms have been failures or have led to any valuable outcomes. This investigation has not sought to evaluate any of these reform programmes as such, but rather to look at the interaction of local, national and international factors in their operation.



and national concerns and be enacted in the day to day institutions and decisions of the people they affect.

The idea that there are two sites of global law, in political economy and in human rights, as proposed by Fitzpatrick, hardly reflects actual diversity of sites at which law operates. Since there is no way to differentiate rights from political economy – unless perhaps in Santos's frankly evaluative terms as greed versus solidarity<sup>55</sup> – reform operates only through the shifting alliances of interest groups and competing ideologies. As demonstrated by these case studies, there are a multitude of formal and informal legal sites where disputes are resolved, decisions are made, cases are processed and wrongs are adjudicated. Any of these disputes may involve a complex range of rights and wrongs, of economic costs and benefits. Sites of the material enactment of law refer to their own versions of the universal for their conception of right and legitimacy. They are neither inherently local nor unambiguously global. Local interests in fair commercial dealing can call on international legal norms just as local religious or egalitarian movements may refer to universal Islamic or socialist values. In contrast to the local sites where law is performed, these universal sites exist in a multitude of indigenous, religious, political and legal imagined communities, each of which may be invoked in attempts to reform local practice.

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55 The binary opposition of these 'sites' may better be understood in Santos's frankly evaluative terms as greed versus solidarity.